



STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION
DIVISION OF WATER POLLUTION CONTROL
401 CHURCH STREET
L & C ANNEX 6TH FLOOR
NASHVILLE TN 37243-1534

August 9, 2007

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
RECEIPT #7099 3400 0014 0976 0588

Marcus Smartt
P.O. Box 126
Altamont, Tennessee 37301

Subject: MARCUS SMARTT
 DIRECTOR'S ORDER NO. WPC07-0144
 GRUNDY COUNTY, TENNESSEE

Dear Mr. Smartt:

Enclosed is a Director's Order and Assessment of Civil Penalty issued by Paul E. Davis, Director of the Division of Water Pollution Control, under the delegation of Commissioner James H. Fyke. Read the Order carefully and pay special attention to the NOTICE OF RIGHTS section.

It is the Department's position that corporations, limited partnerships, limited liability companies, and other artificial entities created by law must be represented in any legal proceeding resulting from an appeal of this Order and Assessment by an attorney licensed to practice law in the State of Tennessee. Non-attorneys may participate in any such proceedings to the extent allowed by law.

If you or your attorney has questions concerning this correspondence, contact me at (615) 532-0670.

Sincerely,

Vojin Janjic
Manager, Enforcement and Compliance Section

cc: WPC-EFO-CH-RDU
 WPC-NCO-E&C

**STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION**

IN THE MATTER OF:)	DIVISION OF WATER
)	POLLUTION CONTROL
)	
)	
MARCUS SMARTT)	
)	
)	
)	
RESPONDENT)	CASE NO. WPC07-0144

DIRECTOR'S ORDER AND ASSESSMENT

NOW COMES Paul E. Davis, Director of the Tennessee Division of Water Pollution Control, and states:

PARTIES

I.

Paul E. Davis is the duly appointed Director of the Tennessee Division of Water Pollution Control (hereinafter the "director" and the "division" respectively) by the Commissioner of the Tennessee Department of Environment and Conservation (hereinafter the "commissioner" and the "department" respectively).

II.

Marcus Smartt (hereinafter the "Respondent") is the owner and developer of property located in Grundy County on Highway 56 in Altamont, Tennessee (hereinafter the "site"). Service of process may be made on the Respondent at P.O. Box 126, Altamont, Tennessee 37301.

JURISDICTION

III.

Whenever the commissioner has reason to believe that a violation of Tennessee Code Annotated (T.C.A.) §69-3-101 *et seq.*, the Water Quality Control Act, (hereinafter the “Act”), has occurred, or is about to occur, the commissioner may issue a complaint to the violator and may order corrective action be taken pursuant to T.C.A. §69-3-109(a) of the Act. Further, the commissioner has authority to assess civil penalties against any violator of the Act, pursuant to T.C.A. §69-3-115 of the Act; and has authority to assess damages incurred by the state resulting from the violation, pursuant to T.C.A. §69-3-116 of the Act. Department rules governing general water quality criteria and use classifications for surface waters have been promulgated pursuant to T.C.A. §69-3-105 and are effective as the *Official Compilation Rules and Regulations of the State of Tennessee*, Chapters 1200-4-3 and 1200-4-4 (hereinafter the “Rule”). Pursuant to T.C.A. §69-3-107(13), the commissioner may delegate to the director any of the powers, duties, and responsibilities of the commissioner under the Act.

IV.

The Respondent is a “person” as defined at T.C.A. §69-3-103(20) and, as hereinafter stated, the Respondent has violated the Act.

V.

The unnamed tributaries to Big Creek and Big Creek are referred to herein, as “waters of the state,” as defined by T.C.A. §69-3-103(33). Pursuant to T.C.A. §69-3-105(a)(1), all waters of the state have been classified by the Tennessee Water Quality

Control Board for suitable uses. Department Rule 1200-4-4, "Use Classifications For Surface Waters," is contained in the *Official Compilation of Rules and Regulations for the State of Tennessee*. Accordingly, the unnamed tributary to Big Creek and Big Creek have been classified for the following uses: fish and aquatic life, recreation, irrigation, and livestock watering and wildlife.

VI.

T.C.A. §69-3-108 requires a person to obtain coverage under permit prior to discharging any substance to waters of the state, or to a location from which it is likely that the discharged substance will move into waters. Coverage under the General Permit for Storm Water Discharges Associated with Construction Activity (hereinafter the "TNCGP") may be obtained by submittal of a Notice of Intent (NOI), site-specific Storm Water Pollution Prevention Plan (SWPPP), and associated fee.

VII.

T.C.A. §69-3-108 requires a person to obtain a permit from the department prior to the alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state. Pursuant to T.C.A. §69-3-108, Rule 1200-4-7-.04 requires a person to submit an application prior to engaging in any activity that requires an Aquatic Resource Alteration Permit (ARAP) that is not governed by a general permit or a §401 Water Quality Certification. No activity may be authorized unless any lost resource value associated with the proposed impact is offset by mitigation sufficient to result in no overall net loss of resource value.

FACTS

VIII.

On May 3, 2007, the division conducted a site investigation and observed that over one acre of land had been cleared and graded with no erosion prevention and sediment control (EPSC) measures installed. Upon further investigation, it was determined that the land clearing activities had been conducted without coverage under the TNCGP. Additionally, the division observed that two road crossings had been constructed in the unnamed tributaries to Big Creek, without ARAP authorization.

IX.

On June 7, 2007, the division returned to the site and observed that EPSC measures were not being utilized, and sediment deposition was observed in an unnamed tributary to Big Creek, at one of the road crossing areas.

X.

On June 13, 2007, the division issued a Notice of Violation (NOV) to the Respondent for the violations observed during the May 3, and June 7, 2007, site visits. The NOV instructed the Respondent to implement appropriate EPSC measures by June 27, 2007, to stabilize the site. Submit a NOI, SWPPP, and associated fee by June 29, 2007, seeking coverage under the TNCGP. The NOV further notified the Respondent that ARAP authorization must be obtained for future stream alterations occurring on site.

XI.

On July 23, 2007, the division conducted a site investigation and observed that some EPSC measures, consisting of silt fence and check dams, had been installed since the previous site visit. However, the EPSC measures utilized were not installed correctly and were not functioning properly. Sediment deposition was observed in the unnamed tributaries to Big Creek in the vicinity of the culvert areas. Sediment deposition in front of one of the culverts was blocking the flow in the stream channel.

XII.

On August 1, 2007, the division issued a second NOV to the Respondent for the violations observed during the July 23, 2007, site investigation. The NOV notified the Respondent that the division had not received the requested NOI, SWPPP, and associated fee, as requested in the June 13, 2007, NOV. Additionally, the NOV instructed the Respondent to properly install EPSC measures by August 8, 2007, remove the sediment deposition from the two unnamed tributaries to Big Creek and submit a NOI, SWPPP, and associated fee by August 15, 2007.

VIOLATIONS

XIII.

By physically altering waters of the state without authorization under an ARAP, and conducting construction activities without authorization under the TNCGP, the Respondent has violated T.C.A. §§69-3-108(a) and (b) and 69-3-114(b), which states:

T.C.A. §69-3-108:

(a) Every person who is or is planning to carry on any of the activities outlined in subsection (b), other than a person who discharges into a publicly owned treatment works or who is a domestic discharger into a privately owned treatment works, or who is regulated under a general permit as described in subsection (j), shall file an application for a permit with the commissioner or, when necessary, for modification of such person's existing permit.

(b.) It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:

- (1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state;
- (2) The construction, installation, modification, or operation of any treatment works, or part thereof, or any extension or addition thereto;
- (3) The increase in volume or strength of any wastes in excess of the permissive discharges specified under any existing permit;
- (4) The development of a natural resource or the construction, installation, or operation of any establishment or any extension or modification thereof or addition thereto, the operation of which will or is likely to cause an increase in the discharge of wastes into the waters of the state or would otherwise alter the physical, chemical, radiological, biological or bacteriological properties of any waters of the state in any manner not already lawfully authorized;
- (5) The construction or use of any new outlet for the discharge of any wastes into the waters of the state;
- (6) The discharge of sewage, industrial wastes, or other wastes into water, or a location from which it is likely that the discharged substances will move into waters;

T.C.A. §69-3-114(b):

In addition, it is unlawful for any person to act in a manner or degree which is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the board or of any permits or orders issued pursuant to the provisions of this part; or fail or refuse to file an application for a permit as required in §69-3-108; or to refuse to furnish, or to falsify any records, information, plans, specifications, or other data required by the board or the commissioner under this part.

XIV.

By discharging sediment into waters of the state that resulted in a condition of pollution, the Respondent has violated T.C.A. §§69-3-114(a), as stated below, and 69-3-114(b), as referenced above.

T.C.A. §69-3-114(a):

It shall be unlawful for any person to discharge any substance into waters of the state or to place or cause any substance to be placed in any location where such substances, either by themselves or in combination with others, cause any of the damages as defined in §69-3-103(22), unless such discharge shall be due to an unavoidable accident or unless such action has been properly authorized. Any such action is declared to be a public nuisance.

ORDER AND ASSESSMENT

XV.

WHEREFORE, pursuant to the authority vested by T.C.A. §§69-3-107, 69-3-109, 69-3-115, and 69-3-116, I, Paul E. Davis, hereby issue the following ORDER and ASSESSMENT to the Respondent:

1. The Respondent shall, within FOURTEEN (14) DAYS of receipt of this Order, install appropriate professionally designed EPSC measures to assure no sediment leaves the site and enters waters of the state. These professionally designed EPSC measures shall be maintained until final stabilization.
2. The Respondent shall, within THIRTY (30) DAYS of receipt of this Order, submit a NOI, SWPPP, and associated fee to obtain coverage under the TNCGP. The NOI, SWPPP, and associated fee shall be submitted to the manager of the division's Environmental Field Office in Chattanooga

(EFOCH) located at State Office Building, Suite 550, 540 McCallie Avenue, Chattanooga, Tennessee 37402.

3. The Respondent shall within THIRTY (30) DAYS of receipt of this Order, remove the sediment deposition from the two unnamed tributaries to Big Creek. Sediment removal activities shall be conducted using hand tools, and the removed sediment shall be placed in an upland location to ensure that re-entry into the stream does not occur. The Respondent shall notify the manager of the division's EFOCH upon completion.
4. The Respondent is hereby assessed a CIVIL PENALTY in the amount of SEVEN THOUSAND FIVE HUNDRED DOLLARS (\$7,500.00).
 - a. The Respondent shall pay ONE THOUSAND FIVE HUNDRED DOLLARS (\$1,500.00) to the division within THIRTY (30) DAYS of receipt of this Order.
 - b. The Respondent shall pay ONE THOUSAND FIVE HUNDRED DOLLARS (\$1,500.00) to the division within THIRTY (30) DAYS of receipt of this Order, if, and only if, the Respondent fails to comply with Item 1 above in a timely manner.
 - c. The Respondent shall pay TWO THOUSAND DOLLARS (\$2,000.00) to the division within THIRTY (30) DAYS of receipt of this Order, if, and only if, the Respondent fails to comply with Item 2 above in a timely manner.
 - d. The Respondent shall pay TWO THOUSAND FIVE HUNDRED DOLLARS (\$2,500.00) to the division within THIRTY (30) DAYS of

receipt of this Order, if, and only if, the Respondent fails to comply with Item 3 above in a timely manner.

5. The Respondent shall otherwise conduct business in accordance with the Act and rules promulgated pursuant to the Act.

Further, the Respondent is advised that the foregoing Order is in no way to be construed as a waiver, expressed or implied, of any provision of law or regulations. However, compliance with the Order will be one factor considered in any decision whether to take enforcement action against the Respondent in the future. The director may, for good cause shown by the Respondent, extend for a fixed time period, the compliance dates contained within this Order.

To be eligible for this time extension, the Respondent shall submit a written request to be received in advance of the compliance date. The written request must include sufficient detail to justify such an extension and include at a minimum the anticipated length of the delay. The director will reply to the Respondent's request in writing. Should the Respondent fail to meet the requirement by the extended date, any associated CIVIL PENALTY shall become due THIRTY (30) DAYS thereafter.

Issued by the Director of the Division of Water Pollution Control on behalf of the
Commissioner of the Tennessee Department of Environment and Conservation on this
9th day of August, 2007.

A handwritten signature in black ink, appearing to read "Paul E. Davis", is written over a horizontal line.

Paul E. Davis, P.E.

Director, Division of Water Pollution Control

NOTICE OF RIGHTS

T.C.A. §§69-3-109 and 69-3-115, allow the Respondent to secure review of this Order and Assessment. In order to secure review of this Order and Assessment, the Respondent must file with the Office of General Counsel, located at 401 Church Street, L&C Tower 20th Floor, Nashville, Tennessee 37243, a written petition setting forth each Respondent's contentions and requesting a hearing before the Water Quality Control Board. The Respondent must file the written petition within THIRTY (30) DAYS of receiving this Order and Assessment.

If the required written petition is not filed within THIRTY (30) DAYS of receipt of this Order and Assessment, the Order and Assessment shall become final and will be considered as an agreement to entry of a judgment by consent. Consequently, the Order and Assessment will not be subject to review pursuant to T.C.A. §§69-3-109 and 69-3-115.

Any hearing of this case before the Water Quality Control Board for which a Respondent properly petitions is a contested case hearing governed by T.C.A. §4-5-301 *et seq.* (the Uniform Administrative Procedures Act) and the Department of State's Uniform Rules of Procedure for Hearing Contested Cases Before State Administrative Agencies. The hearing is in the nature of a trial before the Board sitting with an Administrative Law Judge. The Respondent may subpoena witnesses on its behalf to testify.

If the Respondent is an individual, the Respondent may either obtain legal counsel representation in this matter, both in filing its written petition and in presenting evidence at the hearing, or proceed without an attorney. Low- income individuals may be eligible for representation at no cost or reduced cost through a local bar association or legal aid organization.

Payments of the civil penalty shall be made payable to the "Treasurer, State of Tennessee," and sent to the Division of Fiscal Services-Consolidated Fees Section, Tennessee Department of Environment and Conservation, 14th Floor L&C Tower, 401 Church Street, Nashville, Tennessee 37243. All other correspondence regarding this matter should be sent to Paul E. Davis, Director, Division of Water Pollution and Control, at the address above. Please write your case number on all payments and all correspondence concerning this matter.